APPEAL NO. 022365
FILED OCTOBER 14, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on August 7, 2002. The hearing officer determined that the appellant (claimant) had disability from June 4 through July 9, 2001, as stipulated by the parties, and beginning again on July 17 and continuing through September 24, 2001. The claimant appeals the dates of disability, asserting that disability continued through the date of the CCH, and attaches medical records pertaining to chiropractic treatment between October 1, 2001, and May 13, 2002, as well as physical therapy records from August 6, 7, and 9, 2002, none of which were offered or admitted into evidence during the CCH. The respondent (carrier) replies, objecting to any consideration of the documents attached to the appeal, and urging affirmance of the disability determination.

DECISION

Affirmed.

We first discuss the documents attached to the claimant's appeal which were not offered into evidence at the hearing. Generally, the Appeals Panel does not consider evidence not offered into evidence at the hearing and raised for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that a case be remanded for further consideration, we consider whether it came to the appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). We do not find that to be the case with the documents attached to the appeal, as clearly the medical records were in existence before the CCH, could have been procured by the claimant, and, with due diligence, could and should have been offered at the hearing. As to the physical therapy records from August 2002, such records are not so material that they "would probably produce a different result." To the extent that the claimant appears to be asserting that it is the carrier's fault that he did not have the medical records to submit into evidence, we reject that contention, and remind the claimant that he had the burden of proof on the issue of disability.

Whether the claimant had disability from the compensable injury was a factual question for the hearing officer to resolve. The parties stipulated that the claimant had disability from June 4 through July 9, 2001, and the hearing officer determined that the claimant had disability beginning again on July 17 and continuing through September 24, 2001. Based on the evidence admitted at the CCH, the hearing officer found that "Claimant chiropractic treatment records ended on September 24, 2001," and the evidence sufficiently supports this finding. Section 410.165(a) provides that the

contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. An appeals-level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust and we do not find it to be so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **ASSOCIATION CASUALTY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

HAROLD FISHER, PRESIDENT
3420 EXECUTIVE CENTER DRIVE, SUITE 200
AUSTIN, TEXAS 78731.

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Michael B. McShane
Appeals Judge

CONCUR:

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Elaine M. Chaney
Appeals Judge

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Thomas A. Knapp
Appeals Judge